No. 82-1832

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

TOWN OF HALLIE, ET AL.,

Petitioners,

v.

CITY OF EAU CLAIRE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THE AMICI STATES OF THE SEVENTH CIRCUIT, ILLINOIS, INDIANA AND WISCONSIN, IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the challenged conduct of a city is antitrust immune if the state legislature contemplated the conduct in articulating its policy to displace competition.
2. Whether a city performing a traditional governmental function pursuant to a state policy to displace competition must be actively supervised by the state to receive *Parker v. Brown* immunity.

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IDENTITY AND INTEREST OF THE *AMICI CURIAE*

The States of the Seventh Circuit Court of Appeals, Illinois, Indiana and Wisconsin, respectfully submit this brief as *amici curiae* in support of the respondent, City of Eau Claire, on a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

The Attorneys General of the *Amici* states are the chief law enforcement officers of their respective states. Because of their role, these Attorneys General are often questioned by units of local governments concerning antitrust immunity for public entities under the state action doctrine. As a result, it is crucial for state attorneys general to readily discern the type of legislative action and municipal conduct which will give rise to state action immunity. The *Amici* submit that an affirmance of the decision of the court below will constitute a significant step toward clarification of the state action doctrine as applied to units of local government.

SUMMARY OF ARGUMENT

This Court has consistently held that state action immunity applies to acts taken pursuant to a clearly articulated and affirmatively expressed state policy to displace competition. The Court has also made clear that a state policy to displace competition involving cities is sufficiently articulated if it is found "from the authority given a city to operate in a particular area that the legislature contemplated the kind of action complained of." *City of Lafayette v. Louisiana Power and Light Co.*, 435 U.S. 389, 415 (1978); *see also Community Communications Co. v. City of Boulder*, 455 U.S. 40, 55-56 (1982). Here, Wisconsin statutes not only permit cities to refuse sewage services to unincorporated areas but evidence the legislature's intention that annexation, rather than competition, result from a city's provision of such services. *See* WIS.STAT.

sec. 66.069(2)(c) (1981); sec. 144.07 (1m) (1981). The Wisconsin legislature, therefore, specifically contemplated that cities providing sewage treatment services to unincorporated areas would not have to compete with those areas. The challenged conduct of the City of Eau Claire is consistent with the intention and contemplation of the Wisconsin legislature and is entitled to state action immunity.

Finally, a city performing a traditional governmental function pursuant to a state policy to displace competition need not be actively supervised by the state to receive *Parker v. Brown* immunity. This Court ruled in *City of Boulder* that neutral grants of home rule power to nonsovereigns such as cities do not constitute a clearly articulated and affirmatively expressed state policy to displace competition. However, both home rule and non-home rule units of local government are charged by state legislatures with the sovereign duty to protect the health, safety and welfare of their constituents while providing local governmental services. While such grants of power are insufficient to constitute a policy to displace competition, they are sufficient to eliminate the need for active state supervision over local governmental functions.

ARGUMENT

I.

THE CHALLENGED CONDUCT OF A CITY IS ANTITRUST IMMUNE IF THE STATE LEGISLATURE CONTEMPLATED THE CONDUCT IN ARTICULATING ITS POLICY TO DISPLACE COMPETITION.

State action immunity applies to acts taken pursuant to a clearly articulated and affirmatively expressed policy to displace competition with regulation or monopoly public service. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978); *Hoover v. Ronwin*, ... U.S. ....., 104 S.Ct. 1989 (1984). Such a state policy immunizing the conduct of a city is sufficiently articulated if it is found "from the authority given a city to operate in a particular area that the legislature contemplated the kind of action complained of." *City of Lafayette*, 435 U.S. at 415; *see also Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982); *Hoover v. Ronwin*, 104 S.Ct. 1989 (1984). This "contemplation" test was well-explained by the Fifth Circuit in *City of Lafayette*:

> [A] district court must ask whether the state legislature contemplated a certain type of anticompetitive restraint. In our opinion, though, it is not necessary to point to an express statutory mandate for each act which is alleged to violate the antitrust laws. It will suffice if the challenged activity was clearly within the legislative intent. Thus, a trial judge may ascertain, from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of. On the other hand, as in *Goldfarb*, the connection between a legislative grant of power and the subordinate entity's asserted use of that power may be too tenuous to permit the conclusion that the entity's intended scope of activity encompassed such conduct. Whether a governmental body's actions are comprehended within the powers granted to it by the legislature is, of course, a determination which can be made only under the specific facts in each case. A district judge's inquiry on this point should be broad enough to include all evidence which might show the scope of legislative intent. (footnotes omitted).

City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431, 434-35 (5th Cir. 1976).

The test articulated by the Fifth Circuit and adopted by this Court was applied in *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982). In *City of Boulder*, this Court aptly noted that a neutral grant of home rule power did not contemplate anticompetitive conduct by a city. The Court concluded that the home rule powers simply did not evidence any legislative intent to limit competition for cable television services or any other services.

Here, of course, the Wisconsin legislature specifically contemplated a city's refusal to provide sewage services to unincorporated areas on a competitive basis. Section 66.069(2)(c) of the Wisconsin statutes expressly permits cities to fix the geographic limits of such services to unincorporated areas and to refuse services beyond the area delineated. Furthermore, section 144.07(1m) makes clear that cities may lawfully refuse the order of a state agency to provide sewage services to an unincorporated area provided the area rejects annexation.[1] It thus not only seems

[1] As the Seventh Circuit stated, "it seems that the legislature viewed annexation by the city of a surrounding unincorporated area as a reasonable *quid pro quo* that a city could require before extending sewer services to the area." *Town of Hallie v. City of Eau Claire*, 700 F.2d 376 at 383 (7th Cir. 1983), quoting *Town of Hallie v. City of Chippewa Falls*, 105 Wis.2d 533, 314 N.W.2d 321, 325-26 (1982).

clear that the legislature intended Wisconsin cities to have broad control over the provisions of sewage services, but that annexation, rather than competition, would result from the provision of such services to unincorporated areas. Indeed, under appropriate circumstances, the legislature intended that unincorporated areas were to be annexed and eliminated as competitors of the cities altogether. In view of these legislative provisions, the City of Eau Claire's refusal to provide sewage services to neighboring towns on a competitive basis was contemplated by the Wisconsin legislature in furtherance of a clearly articulated and affirmatively expressed state policy. A more specific legislative authorization to confer state action immunity is unnecessary under this Court's decision in *City of Lafayette*, 435 U.S. at 415.

The Town of Hallie, however, proposes a new test to determine whether anticompetitive conduct is antitrust immune. Apparently dissatisfied with this Court's pronouncement in *City of Lafayette* and *City of Boulder*, that conduct "contemplated" by the legislature is immune, the Town insists that "[t]he proper test is whether the particular conduct of the city 'necessarily follows' from the State's clear affirmative declaration of state policy." Pet. Br. at 27. This "necessarily follows" test is inaccurate for at least two reasons. First, the test ignores the fact that a state policy to displace competition is itself confirmed by a finding that the challenged conduct was contemplated or intended by the state legislature. *See City of Lafayette*, 435 U.S. at 415; *City of Boulder*, 455 U.S. at 55; *see also Antitrust Immunity*, 95 Harv.L.Rev. 435; 445-446 (1981). Second, the attempt to redefine "contemplated" activity as conduct which "necessarily follows" from a legislative

enactment accomplishes little, if anything.[2] The essential inquiry remains the same—"to include all evidence which might show the scope of legislative intent." *City of Lafayette*, 435 U.S. at 415, quoting 532 F.2d at 434-35. This sort of traditional search for legislative intent is routinely conducted by the federal courts and needs no redefinition. Here, the Seventh Circuit carefully analyzed the relevant Wisconsin statutes and correctly concluded that the challenged conduct of the City of Eau Claire was contemplated by the statutes.

II.

A CITY PERFORMING A TRADITIONAL GOVERNMENTAL FUNCTION PURSUANT TO A STATE POLICY TO DISPLACE COMPETITION NEED NOT BE ACTIVELY SUPERVISED BY THE STATE TO RECEIVE *PARKER v. BROWN* IMMUNITY.

From the town crier in colonial America to the present days of high technology, local units of government have provided essential services to promote the health, safety and welfare of their constituents. For at least the last century, state constitutions and statutes have given independent legal status to these public entities and have specifically delegated to them the responsibility to perform governmental functions. These functions, in turn, have

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[2] The Seventh Circuit concluded that "reasonable or foreseeable" consequences of authorized activity are immune. *Town of Hallie v. City of Eau Claire*, 700 F.2d 376, 381 (7th Cir. 1983). Other attempts to give a parameter to legislative intent in this regard have been made. For example, in *Gold Cross Ambulance & Transfer v. City of Kansas City*, 705 F.2d 1005 (8th Cir. 1983) the Eighth Circuit concluded that a "sufficient state policy to displace competition exists if the challenged restraint is a necessary or reasonable consequence of engaging in the authorized activity." *Gold Cross*, 705 F.2d at 1012-1013.

been promulgated and implemented through the years by official documents such as ordinances and regulations, all readily subject to close public scrutiny. Provided local governmental units conform to state-wide policy, states have devoted their limited resources to matters other than the supervision of traditional public services rendered by units of local government. There is no reason to change the practice now. If a city is performing a traditional governmental function pursuant to a state-wide policy to displace competition, "[i]t would seem rather odd to require municipal ordinances to be enforced by the State rather than the city itself." *City of Boulder*, 455 U.S. at 71, n.6 (Rehnquist J., dissenting).

Moreover, the states are incapable and unwilling to undertake the enormous burden of actively supervising the broad range of local services provided by public entities ranging from cities and towns to mosquito abatement districts. In Illinois, for example, the legislature eschewed any notion of active supervision in enacting a *Boulder* bypass statute.

In November, 1983, the General Assembly enacted Public Act No. 83-929 which amended a number of statutes governing various local governmental operations.[3] The Act amended, *inter alia*, the Municipal Code to include the following language:

> It is the policy of this State that all powers granted, either expressly or by necessary implication, by this Code, other Illinois statute, or the Illinois Constitution to non-home rule municipalities may be exercised by those municipalities notwithstanding effects on competition.
>
> It is further the policy of this State that home-rule municipalities may (1) exercise any power and perform any function pertaining to their government and affairs or (2) exercise those powers within traditional areas of municipal activity, except as limited by the Illinois Constitution or a proper limiting statute, notwithstanding effects on competition.
>
> It is the intention of the General Assembly that the "State action exemption" to the application of federal antitrust statutes be fully available to municipalities to the extent their activities are authorized by law as stated herein.

Ill.Rev.Stat. (1983 Supp.), ch. 24, par. 1-1-10. The *Amici* submit that the Illinois statute reflects the proper aversion to active state supervision over the provision of public services by local governmental units.

This Court ruled in *City of Boulder* that neutral grants of home rule power to nonsovereigns such as cities do not constitute a clearly articulated and affirmatively expressed state policy to displace competition. However, both home rule and non-home rule units alike are charged by the state legislatures with the duty to provide local services relating to public health, safety and welfare. While such grants of power are insufficient to constitute a policy to displace competition, they are sufficient to dispense with the need for active state supervision over local governmental functions.

[3] In substantially identical language, Public Act No. 83-929 amended or added new paragraphs to the following nine statutes: Ill.Rev. Stat. (1983 Supp.), ch. 24, par. 1-1-10; ch. 34, par. 401; ch. 34, par. 716; ch. 38, par. 60-11; ch. 42, par. 323; ch. 85, par. 2801; ch. 111⅔, par. 702.22; ch. 122, par. 1-4; ch. 139, par. 38.

CONCLUSION

For all of the reasons stated herein, the *Amici* respectfully request that the decision of the Seventh Circuit Court of Appeals be affirmed.

Respectfully submitted,

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